No. 3832

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

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JOHN D. SPRECKELS, as special administrator of the estate of John D. Spreckels, Jr., deceased,

Plaintiff in Error,

vs.

EDITH H. WAKEFIELD,

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR.

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The contract alleged in the complaint is not against public policy. It was not collusive. Collusion must appear from the face of the contract in the light of the circumstances surrounding it. The parties to the contract had been separated and estranged for about a year before the contract was made. (Record p. 66.)

The recitals in the contract show that Mrs. Wakefield had already resolved on divorce proceedings and had employed an attorney to that end. The

contract recited that the motive of the contract was in these words:

> "Said parties desire to avoid the expense of litigation over any and all questions as to their respective property rights, including the rights of the second party to temporary and permanent alimony, and also desire to avoid any controversy over the care, custody and maintenance of the minor children of said parties." (Record p. 14.)

The trial court found that the contract was free from collusion. (Record p. 33.) And the court found that the reason stated in the contract for making the contract was the real moving cause thereof. (Record p. 33.) In the divorce action the court recited in its findings of the proceedings before it that all the allegations of the complaint therein were true and they were sustained by testimony free from all legal exceptions as to its competency, admissibility and sufficiency, and that all the allegations of the defendant's answer in the divorce action were untrue. (Record p. 35.) This must be taken as the equivalent of proof that at the time the contract was made a valid undisputed ground of divorce existed in favor of the plaintiff.

That which is authorized by statute can not be against public policy. The statutes of California on the subject of divorce is contained in the Civil Code, Secs. 90 to 107. The grounds for which a divorce will be granted are stated in Sec. 92 of the Code to be: adultery, extreme cruelty, wilful desertion, wilful neglect, habitual intemperance, conviction of

felony. If any of these grounds exist, the state, by its laws, has signified its consent to a dissolution of the marital relation.

Assuming the grounds of divorce to exist, the state has no policy to be served by a continuance of the marital relation. That is the reason for the statute.

The way in which the parties husband or wife will conduct themselves toward one another after a cause of action for divorce exists is not of concern to the state. The right to divorce by the innocent party can be availed of to dissolve the marriage bonds or the innocent party can forbear or condone. But whatever the choice made by the innocent party, the law does not seek to influence it. This of course assumes one innocent party, with an entire absence of fraud upon the rights of society by the parties. Where a party has an unqualified right to divorce on the grounds, say of adultery, an agreement between the two parties that the innocent party shall avail herself of the right the law gives her cannot be against public policy. To hold that such an agreement is against public policy is to condemn the law itself. Such an agreement would be futile but would not be against public policy. Such an agreement might be evidence of collusion, and should be closely scanned. It is not, however, conclusive evidence of collusion as the appellant in this action argues. If, when scanned, the court is convinced of the good faith of the transaction and its freedom from fraud the contract should not be declared invalid. The agreement standing fair is

not against public policy. There is no public policy that demands closing of the door of inquiry as to whether there has been actual collusion in the making of the agreement, or which would bar the parties from purging the agreement of any implication of collusion. The authorities hereinafter cited fully sustain the foregoing reasoning. It will be observed that this agreement assumes throughout a ground of divorce existed at the time of the agreement.

There is nothing whatever in the division of property of the spouses between them that is against public policy. Civil Code, Secs. 158-159. By the express provision of the statute the spouses could make any settlement and provision for support upon a contemplated separation, then why not in case of a contemplated divorce? The separation, so far as the statute limits it, may be for an indefinite period and may be for life. The disruption of the marital relations occurs in case of a separation as it does in case of divorce. What is the difference to society whether spouses are separated for life or divorced? Why should any inhibition exist on the contract in the case of divorce, which by the express provision of the statute does not exist in the case of a separation, however long continued? In the one case the subject is to be investigated and decided by the court, in the other not. This difference furnishes the ground for the rule against collusion. The court must be protected from fraud or collusion between the parties. This means actual fraud and actual collusion, and not imputed fraud

or imputed collusion. It is only where such division of property is an inducement to an actually collusive arrangement for divorce that public policy is violated. Having the two features, agreement that an innocent party will avail herself of the right given by the statute, where an unquestioned right to divorce exists under the statute, and a division of the property to follow the exercise of the right given by the statute, the arrangement can not be against public policy.

The rule is announced in 2 L. R. A. 708, in note to *Edleson v. Edleson,* as follows:

> "There seems to be no presumption that a contract for the settlement of property rights, made in contemplation of a possible divorce, is necessarily collusive, but the court will look to all the facts and circumstances of the case to determine whether the contract has that effect in each particular case. (Doose v. Doose, (1916) 198 Ill. App. 387; Martin v. Martin, (1884) 65 Iowa 255, 21 N. W. 595; Rapp. v. Rapp, (1912) 162 Mo. App. 673, 145 S. W. 114; Hudson v. Hudson, (1914) 176 Mo. App. 69, 162 S. W. 1062; Daggett v. Daggett, (1835) 5 Paige (N. Y.) 509, 28 Am. Dec. 442; Doeme v. Doeme, (1904) 96 App. Div. 284, 89 N. Y. Supp. 215; Wilhelmi v. Wilhelmi, (1899) 9 Pa. Dist. R. 685.)"

The note last quoted from was a most comprehensive one on the subject of collusion, with many cases reviewed.

In *Nelson on Divorce and Separation,* Sec. 509, he states the rule as follows:

> "The parties may make a valid agreement concerning alimony or division of their prop-

> erty. And such agreement is not void because entered into before suit was commenced or made in anticipation of a suit for divorce. Such agreement must be confined strictly to alimony, or a division of the property. If the agreement contains a stipulation concerning the suppression or misrepresentation of the real facts, or the nature of the agreement is such that the husband has an active interest in assisting the wife and in foregoing resistance, the agreement is collusive and void because contrary to public policy."

The contract in this case is not void on its face. It did not require Mrs. Spreckels to bring a suit for divorce. It did not require Mr. Spreckels to bring suit for divorce. It did not waive any defense that Mrs. Spreckels had in the event that Mr. Spreckels brought the action. It did not waive any defense that Mr. Spreckels had in the event that Mrs. Spreckels brought the action. It did not agree to any course of conduct by either party with relation to a suit for divorce, if one were brought.

The contract provided a *time,* to be determined by an event, upon the happening of which the sums would be paid. The face of the contract is consistent with the fact that the divorce proceedings were to be vigorously contested. There is no admission of a cause of divorce on the face of the contract. In fact, taking the contract for the inducements that it offers on its face, it was an inducement to Mr. Spreckels to defeat the procuring of a divorce by Mrs. Spreckels. On its face, Mrs. Spreckels, by the instrument itself, conveyed to Mr.

Spreckels all interest in the community property and all interests in his separate property *in praesenti.* It was executed when delivered as to those parties. If he should then defeat the divorce proceedings and prevent a decree in Mrs. Spreckels' favor, the rights under the instrument of Mrs. Spreckels would be defeated, and the benefits of the instrument would have been received by Mr. Spreckels without the burdens of the provisions of the instrument.

All the facts surrounding the making of the agreement make it even more certain that no collusion or fraud was contemplated or was practiced upon the court in the divorce proceedings. The instrument was before the court, as shown by the final decree. (Record pp. 36, 63.) The facts alleged as cause for the divorce were denied by the verified answer of Mr. Spreckels. (Record p. 57.) The issue was clearly made. There was a trial, as recited in the decree, on the 22nd day of August, 1914, and

> "It was proven to the satisfaction of the court, and the court found that all of the allegations of the said complaint were true, and that they were sustained by testimony free from all legal exceptions as to its competency, admissibility and sufficiency." (Record p. 60.)

In the allegation in the answer it is alleged that there was a trial of the issues at which the counsel for the respective parties were present. (Record p. 26.) The answer then suggests binding efficacy of the judgment of divorce, and not facts of fraud or collusion that render it invalid.

Some authorities hold that the contract would be valid if made when the divorce action was pending and would be invalid if made prior to the commencement of the action. It is difficult to understand the reason for this distinction, as the court may be imposed upon equally by collusive agreement before or after the suit is commenced.

Plaintiff in error contends that all proceedings for property settlement upon the condition of a divorce being obtained by one or the other of the parties, was always illegal, and states that no case could be found to the contrary.

I take it that neither of these circumstances make a contract collusive which is not so in fact, and do not prove one collusive which is not so in fact. These things alluded to by plaintiff in error are evidentiary facts only and are in no sense conclusively collusive.

The author of the note to the case of *Pierce v. Cobb,* 161 N. C. 300; L. R. A. 44 N. S., announces the rule in the following:

> "Hence it is well settled by unanimous decision that any contract intended or calculated to facilitate the obtaining of a divorce, or to promote the dissolution of the marriage relation, is void as against public policy. This does not mean, however, that every contract that depends for its effectiveness or enforcement upon the granting of a divorce in the future must necessarily be void, although that fact might, and probably would, serve to arouse suspicion, and to induce a rigid scrutiny of its real intent and effect. But the courts will examine

each contract upon its own merits, and subject it to the test that it must not either in intent or effect facilitate the procurement of a divorce. It seems that contract may be entered into in good faith in order to settle property rights, and may be valid and enforceable, although made to depend for effectiveness upon the event of a divorce in the future, provided that neither party is thereby induced to bring divorce proceedings or dissuaded from contesting the same. In other words, there seems to be no binding, conclusive presumption that every contract for the settlement of property rights made in contemplation of a possible divorce necessarily facilitates such divorce, but the court looks to all the facts and circumstances of the case in order to determine whether it does have that effect in that particular case."

Spalding v. Spalding, 184 Ill. App. 217:

In this case there was a pending suit for divorce between Mr. Spalding and Mrs. Spalding. Mrs. Spalding was the daughter of White. Mr. White made a contract with Mrs. Spalding whereby he promised, if she would forego a controversy in the divorce for alimony and would come to his home and keep house for him, he would give her ten thousand dollars, *if the divorce was granted.* This contract was held to be valid.

Pryor v. Pryor, 114 S. W. 700:

In this case proceeding for divorce was pending and an agreement was made between the husband and wife, and it was provided that a lien should be

created on the property of the husband in favor of the wife:

> "And it shall also be specified in any decree of divorce that may be rendered in the cause aforesaid that the performance of the agreement of the said James F. Pryor, as aforesaid, shall be a charge and a lien upon the property aforesaid."

In answering the contention that this contemplated contract that the wife would procure a divorce in order that the provisions could be effective, the Supreme Court of Arkansas stated:

> "Husband and wife may, when separation has taken place, or is to take place immediately, contract with each other for the payment by the husband of money to her for her support." (Citing cases.)

> "A decree of divorce granted subsequently does not annul the contract. Why, then, should not they be permitted to contract for the payment of alimony in contemplation of an immediate divorce? It violates no rule of public policy, for the husband is liable for the wife's support during the continuance of the marriage relation, and it is within the power of the court to grant alimony after the relation is dissolved."

Hammerstein v. Equitable Trust Co., 141 N. Y. S. 1065; also reported in 156 App. Dic. 644:

A trust was created. Hammerstein and his wife had been living separately when the trust was made. It was made after the commencement of the divorce action, and "It was to take effect only in case the plaintiff should succeed in obtaining a final judg-

ment *severing the bonds of matrimony*". See page 1070. Of such an agreement the court says:

> "Such an agreement, openly made and submitted to the court, is not against the policy of the law, but is in conformity with the general rule which favors ending litigation by agreement where possible."

This case was affirmed in 209 N. Y. 429.

Werner v. Werner, 153 App. Div. 719; 138 N. Y. S. 633:

In this case an agreement provided that the plaintiff would pay "in the event of the plaintiff obtaining the final decree against the defendant, the sum of $2,080; which should be in full of all counsel fees, costs, disbursements, and charges of every nature and kind whatsoever". This was held to be a valid contract. The parties were living apart and divorce proceedings had commenced and were pending.

Amspoker v. Amspoker, 155 N. W. 602:

In this case the parties made a settlement of their property rights before suit for divorce, after the separation. The husband promised to pay the wife's doctor bills, hospital bills, and costs of suit by her for a divorce and an attorney's fee for prosecuting it. In addition he agreed to pay her for support and maintenance $3000.00, in monthly payments of $50.00 each. She sued to enforce the agreement. The defense was made that the contract

was void as facilitating a divorce in violation of public policy. The court says:

> "On the part of plaintiff there was no occasion for collusion. The evidence shows beyond question that the parties were not living together as man and wife when the contract was executed, that plaintiff then had more than one legal ground for a divorce, that she was entitled to reasonable alimony, that marital relations were never resumed, and that a divorce was promptly granted to her. Under such circumstances the law in the states of this country, with one or two exceptions, is that reasonable agreements confined to the adjustment of property rights are binding on the parties and may be enforced by the courts. Cases announcing this rule and giving the reasons on which it rests are collected in a note in 12 L. R. A. (N. S.) 848, Hill v. Hill, 74 N. H. 288, 67 Atl. 406, 124 Am. St. Rep. 966.
>
> It is argued, nevertheless, that the contract, in requiring defendant to pay the costs of a divorce suit and an attorney's fee for prosecuting it, indicates collusion and an unlawful purpose to facilitate the procuring of a divorce. This position is untenable for the following reasons: Plaintiff's right to a divorce on legal grounds was free from doubt. Her right to reasonable alimony was equally clear. A court, upon a proper showing, would have required defendant to pay the costs of a divorce suit and the fee of an attorney for prosecuting it. In mutually settling property rights during a permanent separation, defendant lawfully assumed such burdens. The contract did not require plaintiff to commence a suit for a divorce, and, if brought, defendant was left free to make a defense. The circumstances surrounding the transactions and the language used in the written instrument do not require a construction

> which would invalidate the contract. It follows that the trial court did not err in refusing to cancel it on these grounds."

In the case at bar, as in this last cited case, there was nothing that required either party to bring a suit for divorce or to waive any defense. This case very consistently puts the fact of collusion as the test of invalidity of contract, and not circumstances which may or may not prove collusion and only gives weight to circumstances as evidence in determining the fact of collusion.

Stoff v. Erken, 25 Cal. App. 528:

In this case the trial had proceeded and some evidence was in. It was agreed that further evidence would not be introduced. It was further agreed that Mrs. Erken was to get the decree of divorce. The agreement disposed of the property interests. The court held the agreement to be valid; this was held because of the fact that the evidence was conclusive against the offending party. Rehearing was denied in the Supreme Court.

The conclusiveness of the testimony in the case at bar is recited in the judgment in *Spreckels v. Spreckels*, and brings this case squarely within the principle announced in *Stoff v. Erken.*

In all of these cases it will be observed that the judgment of divorce was to follow the agreement and in some manner the payment was to be made in the event that the judgment of divorce was entered. In some of them the contract was made after

the divorce suit was commenced; in others it was not.

We are unable to see wherein an agreement made before the suit is commenced is conclusive of the fact of collusion, whereas the same agreement, after the suit is commenced, is not evidence of the same weight.

The California cases announce no different ruling from that stated by the compiler of the note reported in the 44 L. R. A., infra.

The California cases upon the subject are as follows:

Beard v. Beard, 65 Cal. 354;
Loveren v. Loveren, 106 Cal. 509;
Newman v. Freitas, 129 Cal. 285;
Pereira v. Pereira, 156 Cal. 1;
Estate of Yoell, 164 Cal. 548;
Bowden v. Bowden, 175 Cal. 711.

In the case of *Beard v. Beard,* 65 Cal. 354, the agreement was admittedly collusive. The consideration for four notes was "abandoning her defense in an action for divorce then pending between them, and doing nothing to resist, or prevent, or delay him in obtaining a decree of divorce therein". The court stated, in the course of its opinion that

> "this agreement was a fraud on the court, and in contravention of the policy of the law". (p. 355.)

Loveren v. Loveren, 106 Cal. 509:

This was a suit commenced for divorce. The question arose in the divorce proceedings as to the

validity of an agreement made between the husband and wife before the divorce proceedings were commenced. The agreement purported to dispose of the property rights. The consideration for the agreement was the destruction of evidence contained in letters and photographs of letters, and the court found that

> "It was agreed by and between the parties to the action, as a part consideration therefor, that they were to entirely settle the whole cause and causes of action set forth in the complaint and cross-complaint herein; that defendant would withdraw his defense and his allegations against plaintiff; that plaintiff would withdraw all her charges against defendant except the charge of desertion; and that defendant would make no defense and permit the charge of desertion to be proven by plaintiff unchallenged."

Newman v. Freitas, 129 Cal. 285.

This was a case on a contract made between an attorney for the wife in contemplated divorce proceeding, and the wife. The attorney was to be compensated by a certain percentage of the recovery of the property of the husband in the divorce proceedings.

In *Pereira v. Pereira,* 156 Cal. 1, where a case for divorce was pending, an agreement was made between husband and wife to become reconciled and the suit was dismissed. The agreement provided for offenses that might thereafter be committed by the husband, and it provided that if he did commit any offense against the marital relation that the full amount of his wife's recovery against him

should be $10,000.00 It was held to be the purpose here to provide security against his own offenses by a sum which was inadequate compared with the value of his estate, and for that reason the agreement was held to invite infractions "thereafter" of the marital relations. The contract was held to be invalid because of that feature.

In *Bowden v. Bowden,* 175 Cal. 713, it is said of *Loveren v. Loveren,* and *Pereira v. Pereira,* that the agreements were in the nature of a collusive arrangement based upon the division of the community property, under which it was to be made easy for one of the spouses to secure a divorce from the other, and it was there said that *Newman v. Freitas* was of the same nature.

The *Estate of Yoell,* 164 Cal. 540, presented a discussion upon subjects more or less related.

It will be observed that in California there is no case where a contract has been declared invalid, where such contract was for the payment of alimony or distribution of property, when made between husband and wife in contemplation of a divorce proceeding thereafter to be had, where there was no collusive agreement to perpetrate a fraud upon the court. That is to say, there is no case in California where an agreement which would have been valid if made after suit was commenced was declared invalid because made before suit was commenced; or that was declared invalid because the payment was provided to be made in the event that

the decree of divorce was rendered in a particular way.

Again we call attention to the fact that the payment very properly commenced with the obtaining of the divorce in the plaintiff's favor. If it had commenced any sooner or if it was to be made regardless of whether Mrs. Spreckels secured a decree, a double obligation would have been on Mr. Spreckels; first, the obligation of the contract, and, second, by the obligation that is created by the marital relation itself. To hold that such a contract is invalid is practically to hold that no contract can be made settling property rights before the divorce is granted.

A review of the authorities cited by plaintiff in error, leads to the same conclusion. The language must be limited by the facts.

Birch v. Anthony, 109 Ga. 379; 77 Am. St. Rep. 379:

Contract signed by wife "relinquishes all claims" as wife, provided a decree was granted to husband by the first day of April, 1895. No divorce was had. The contract would therefore by its own terms seem terminated. However, the court discussed the public policy of the contract.

Adams v. Adams, 25 Minn. 72:

The contract was made between husband and wife. Notes for the payment of money were executed by the husband.

> "At the time the agreement was entered into the parties were still husband and wife."

It contemplated the fact that divorce proceedings had already been or were about to be instituted by the plaintiff against the defendant for the purpose of procuring a dissolution of their marital relations. The wife agreed to receive the notes,

> "in lieu of and in full alimony in said divorce case".

The agreement further provided that said notes and other property so placed in escrow were,

> "to be delivered to her when she shall have procured a decree of divorce, fixing a date, provided the husband *produced no appearance or answer in the case*".

The agreement was never brought to the attention of the court. The court commented upon the provision of the contract requiring that the husband should not appear or answer in the case, as strong evidence of collusion. The contract was not held void, but case was sent back for retrial on the issue of actual collusion.

Emersen v. Emersen, 120 Md. 584; 877 Atl. 1033:

Three of the judges dissented from the conclusion of the court. The question did not arise as to the validity of the agreement. The question arose as to the right to modify the final judgment in a divorce proceeding as to the alimony provision therein. The three dissenting judges held that the validity of the contract was not involved.

Delbridge v. Beach, 68 Wash. 416; 119 Pac. Rep. 856:

The court states the case as follows:

> "It is patent that the employment (of an attorney by the wife to defend suit against the husband) contemplated coercing the husband into a division of his separate property so as to secure to the wife 'the largest possible share' therein. The charge is that, if this could be accomplished in no other way, a divorce suit was to be instituted, having for its object a division of the husband's property. * * * *Nor is it alleged that the wife had any ground for divorce."* (Italics ours.)

The suit was on this contract between the wife and the attorney.

Davis v. Hinman, 103 N. W. 668:

In this case

> "an agreement was entered into between them (husband and wife) that in consideration of the assignment of this contract and the transfer to her husband of a span of horses, he would abandon his defense and allow her to take a decree for divorce."

Kissler v. Kissler, 141 Wis. 491; 124 N. W. 1028:

The court said:

> "While there is no direct agreement on defendant's part to abstain from defending the divorce action, it is very evident that the object and purpose of the agreement was that plaintiff should diligently prosecute her suit for divorce and receive $300.00 for so doing."

Barngrove v. Pettigrew, 128 Iowa, 523; 104 N. W. 904:

Certain attorneys, having heard that a wife intended commencing suit for divorce against her husband, made a certain agreement with the husband by which the attorneys undertook

> "to furnish proof on the trial of the said cause, of the plaintiff's infidelity"

to the husband, and to

> "secure him a divorce from his wife on his cross-complaint to be filed in said suit."

A specific sum was promised to be paid for the services. Suit was brought by attorneys against the husband, and it was held that the contract was void. The reason given being that the contract was an interference of strangers with the marital relation and was contingent upon the success of the attorneys.

It would be a manifest fraud upon the parties to this contract and also upon the court that granted the divorce, if the plaintiff should be denied the benefit of the contract, after she had by the contract surrendered and released every right that the law gave her. If the agreement had been carried into the decree it could not have been disturbed. Yet in that instance the public policy would have remained the same.

Julier v. Julier, 56 N. E. 661.

In the instant case the final decree provided:

> "It is further ordered, adjudged, and decreed that this judgment shall not effect, or be con-

> strued to effect, an existing agreement by and between the parties to this action, made and entered into by them on the 1st day of December, 1913."

This is clear evidence that the contract was before the court in the divorce proceeding, and that it was sanctioned by the court, because the court protected the contract against the very claim here made, that it was merged in the judgment.

If it be the right of the court to protect the marital relation, by granting alimony to the innocent wife and compelling its payment by the guilty husband, then a rule which asserts the invalidity of a contract to that end, after divorce at the instance of the offender gives a premium and prize to the wrongdoer where the contract is executed *in praesenti* by the innocent party. There is after divorce, no marital relation to protect, it has been dissolved, and, as in this case, without fraud upon the court. There is sufficient consideration to support the contract in this case without the provision as to time of payment stipulated. In a case very similar in principle, where the consideration was severable, such a contract was upheld.

McCahan v. McCahan, 31 Cal. App. Div. 1107.

The Civil Code of the State of California, at Section 1599, provides:

> "Where a contract has several distinct objects, of which one at least is lawful, and one at least is unlawful, in whole or in part, the contract is void as to the latter and valid as to the rest."

In the case at bar, the time fixed for performance is not unlawful. It is claimed that it fixes a date of payment, which date could never arrive unless there was a divorce proceeding, and this too where the parties had been living apart for more than one year, and where the court in its decree finds that the evidence fully justified the divorce.

If there had been no divorce granted, the contract based upon a valid consideration would have been valid as to the defendant's obligation to pay, the condition only would be declared invalid. And particularly would this rule find full operation, in a case like this, where the alternative would lead to hardship, injustice and oppression. By the contract a present transfer of rights and property was made by plaintiff to defendant. The Civil Code of the State of California, at Section 1441, provides:

> "A condition in a contract, the fulfillment of which is impossible or unlawful, within the meaning of the article on the object of contracts, or which is repugnant to the nature of the interest created by the contract is void."

So in this case, if the condition fixing the time of payment, contemplated something unlawful, the contract being sufficient without it, would be upheld by disregarding the provision fixing the date after which payments would be made.

The logic of plaintiffs in error's contention is to declare all contracts for settlement of property rights before divorce invalid. On the theory that in every divorce proceeding the State is interested

as a party to preserve the marriage relation. The State is in no manner bound by the recitals or terms of the contract and can introduce evidence regardless of the terms to prove collusion. Regardless of the terms of the contract, oral evidence could be introduced in every case of settlement of property rights, to the effect that the settlement when made contemplated a divorce proceeding. Then any contract, according to plaintiff in error would fail. This is tantamount to holding that no executory contract of settlement can be made preceding a divorce and enforced after divorce. If all mention of divorce had been omitted from the agreement in the case at bar, the facts being as there recited, the objection of plaintiff in error would be equally pertinent. The proof could have been made at the trial of this case. The argument and reason assigned by plaintiff in error does not stop short of condemning all contracts of property settlement, as to promises left executory until after divorce.

The rule destroying contracts made in contemplation of divorce is based upon some substantial foundation. The philosophy underlying it is an actual fraud upon the court, rather than an abstract conception of possible danger that the contract may cloak a collusive agreement. Before the contract will be held invalid, because of being a menace to the marital relation, the contract must be made while the marriage relation is unbroken and must contemplate a fraud upon the court. If marriage relation is already broken by separation

for wrongs constituting a cause for divorce, then there is no marital relation which the law is solicitous to protect, and it provides laws of divorce to complete the severance, and deems that public policy. If, however, before the break in the marital relations or at the time of marriage or before marriage, or at the time of re-establishing the relation after condonation, provision is made which tempts to the destruction of the marital relation, then such a contract, because of its possible influence to disturb what would probably be or might be a happy union, is placed under the ban.

The other class of contracts under the ban are those that tend to a fraud upon the court (and the State) by agreeing to withhold the facts upon the trial, such as agreements not to appear, or not to defend, and which show a collusive arrangement.

In cases, however, where there is already a separation, for a year, as in this case, and the parties make such a contract as was made in this case, it cannot be declared invalid without granting that all settlements contemplating a divorce are invalid whether the evidence is on the face of the contract or not.

There are no doubt cases, here and there, to the contrary of what is here said, being the expression of judges of unusual religious fervor—who view the marital relation and divorce almost entirely from an ecclesiastical standpoint. The rule an-

nounced by such judges, still has the atmosphere of its religious origin.

Barlee v. Barlee, 1 Add. Eccl. 301;
Mortimer v. Mortimer, 2 Hagg. Cons. 310;
Nash v. Nash, 1 Hagg. Cons. 140;
Smith v. Smith, 2 Hagg. Eccl. Supp., Note A.

Still the weight of well considered authority sustains the text writer first quoted in this brief. The rule as so limited by the authority referred to is beneficial. An unqualified rule, such as is contended for by plaintiff in error would be bad policy and entirely out of harmony with the present conception of marriage and divorce, and the rights of contracting by spouses. There is nothing in the California cases to the contrary of what is here contended for by defendant in error, if the language of the opinion is considered with reference to the facts before the court.

> "Before a court should declare a contract not malum in se opposed to sound public policy, it must be entirely satisfied that the public will be substantially benefited, and that such advantage is not merely theoretical or problematical."
>
> *Cox v. Hughes,* 10 Cal. App. 563.

> "Whether or not a contract in any given case is contrary to public policy, is a question of law to be determined from the circumstances of each particular case."
>
> *Spangenberg v. Spangenberg,* 19 Cal. App. 439.

THE INTERLOCUTORY DECREE OF DIVORCE IS NOT RES ADJUDICATA AS TO ANY RIGHTS CREATED BY THE CONTRACT.

The answer of the defendant has what is termed a further defense, wherein the defendant sets up the issues in the divorce proceeding and the judgment therein, and states that the contract was "superseded and merged" in the judgment. (Record p. 27.) There was no express claim of *res judicata.* "Superseded and merged" and *res judicata* are not the same thing. Intention of parties is important or controlling in merger, *res judicata* is independent of the intention of the parties to the action if a trial has been had on the issue. We call attention to the fact that plaintiff in error omits the force of the last provision in the contract. This last provision, in the absence of other proof, is conclusive that the judgment was not on the merits as to the alimony, and therefore not *res judicata,* and showing a contrary intention, could not be a merger. The provision in the contract reads as follows:

> "That the provisions of this agreement shall not be modified or abrogated by any interlocutory decree or final decree of divorce in favor of the second party which may be hereafter made and entered." (Record p. 49.)

In the absence of further showing, this is an agreement between the parties that the issue of property rights and alimony was not to be and was not submitted to the court for its determination, but that such issue was expressly withheld from the court.

As further evidence of that fact we have the statement by the court in the final decree of divorce to the same effect. This, the court recites, was by consent of the parties. (Record p. 63.) This evidence in contract and decree is conclusive proof that the question of property and alimony was not submitted to the courts on the merits of the rights of the parties. The further fact that, despite the provisions of the decree, Mr. Spreckels paid three hundred and fifty dollars a month until April 15, 1915, is evidence that he so regarded the effect of the decree.

Section 1911 of the Code of Civil Procedure of the State of California, reads:

> "That only is deemed to have been adjudged in a former judgment which appears upon its face to have been so adjudged, or which was actually and necessarily included therein or necessary thereto."

In *Oakland v. Oakland Water Front Company,* 118 Cal. 220, it is stated:

> "The form of the judgment is immaterial, but unless it appears from the record that it was given upon a consideration of the merits of the controversy, or if it affirmatively appears that the merits were not considered, it is not available as an estoppel."

Where parties stipulate or reserve questions from the court's consideration, the question is not *res adjudicata. Miller & Lux v. James,* 57 Cal. Dec. 265; 179 Pac. 175. It is there stated:

> "The reservations and provisos in favor of the parties neither add to nor detract from this

> fundamental fact, and the issue having thus been withdrawn by consent, the decision of the court cannot be held to be an adjudication upon the very issue so withdrawn."

The rights created by the contract were not marital rights or obligations; they grew out of the contract, not out of the marriage. The consideration for the contractual obligations were the conveyance of rights to community property and other rights. Being contractual obligations, they could be enforced like any other contractual obligation. The decree of divorce and the issues in the divorce proceeding in no way contemplates a settlement of the contractual rights of husband and wife. These are as independent of the marital relation and the marital obligation as are the contracts of third parties with either. A divorce proceeding therefore does not attempt to adjudicate all the contractual relations of husband and wife. The contract in this instance was no more a subject of adjudication in the divorce proceedings than would be a promissory note given by the husband to the wife have been. This rule is not changed because of the fact that the consideration for the contract was a waiver of certain marital obligations. That question only goes to the sufficiency of the consideration for the contract. If that consideration be valid, and the contract therefore effective the courts, in divorce proceedings, would not have to do with the adjudication of such rights or obligations of such contracts. The divorce court may, if it sees fit, recite the contract as a substitute for the per-

formance that would otherwise devolve upon it, but in no sense would it be compelled to do so, and in no sense would there be an adjudication upon the subject of the contractual obligation.

The only question here, therefore, is, was the contract valid? If valid, then the question of *res adjudicata* has nothing to do with the case. If the contract was valid and the court had attempted to change or modify it in the divorce proceeding, it has been held that such action by the court would have been beyond the court's jurisdiction. See last paragraph in *McCahan v. McCahan,* Cal. App. Dec., volume 31, page 111, where it is stated:

> "It is manifest that in so far as it (the decree) deals with the property rights of the parties, the contract is a valid agreement *with which the court cannot interfere."* (Italics ours.)
>
> *Galusha v. Galusha,* 22 N. E. 1114 (Court of Appeals, New York).

A contract providing for maintenance and support of the wife was modified in the divorce proceeding. The fact that the agreement stood upon consideration growing out of a marital obligation was fully discussed, and it was there held that the separate agreement was not affected by the decree granting the absolute divorce. In this case the court stated:

> "The plaintiff did not in her complaint ask, as a part of the relief, that the separation agreement be set aside. She did not allege that it had been obtained fraudulently, or by

> means of duress. In no way whatever was its validity attacked, or a foundation laid which would have empowered a court of equity to set it aside. The subsequent order of the general term, therefore, in directing such modification of the judgment of divorce as would terminate the force and legal effect of this valid separation agreement, cannot be sustained.
> * * * * * * *
>
> The law looks favorably upon and encourages settlements made outside of court, between parties to a controversy."

The judgment appealed from in this last named case was

> "modified by striking out the provision determining the force and effect of the separation agreement."

This case is very instructive upon the relation of the contract to the divorce proceedings.

See, also,

Levy v. Levy, 144 App. Div. 561;
Lawrence v. Lawrence, 64 N. Y. S. 113;
Nelson v. Vassenden, 115 Minn. 1, 131 N. W. 794.

In the last cited case the contract made between husband and wife was sought to be set aside upon the ground that it was not carried into the decree of divorce. It was held that the contract stood upon its own foundation and whether recited in the decree or not, that its absence from the decree was not *res adjudicata* against it. See paragraph 2. It is there stated:

> "The plaintiff, relying on this agreement and at the request of her husband. * * *

> consented to the omission of this provision from the decree for alimony. If this agreement were to be held void, it would therefore result in one of the very impositions the court seeks to prevent by its scrutiny of settlements between parties in divorce proceedings. Unquestionably it is better practice to submit such agreements to the court and obtain their incorporation in the decree. The party claiming the benefit of such an agreement is thereby relieved from the very serious burden of establishing that the agreement was free from fraud or imposition, and made without collusion, to facilitate the granting of the divorce."

As the action in the instant case could not be prosecuted unless the contract alleged had been made, and as this contract furnishes the primary right upon which the cause of action is predicated, it is hardly necessary to further distinguish cases where no contract whatever existed. There was no contract whatever in the following cases:

Schultz v. Christopher, 118 Pac. 630;
Roe v. Roe, 35 Pac. 880;
Barnett v. Barnett, 50 Pac. 337;
Walker v. Walker, 50 N. E. 68.

The case of *Raines v. Raines,* 76 S. E. 52 (Ga.), was a suit to enjoin the execution of a judgment for alimony. The wife had agreed, in consideration of property, not to insist upon further alimony. The agreement was oral. It was not a suit upon the contract, nor did it involve a contract. The court stated, in denying relief against execution, that the agreement could not be taken advantage of in the proceeding. The court did not hold that the suit

could not have been brought upon the contract, if violated, to recover such damages as might be inflicted by this violation. It merely held that the final decree having been entered the same would be enforced as entered. Whatever breaches of contract would thereby occur would be left to other proceedings in other actions on the contract.

It will be observed that the property rights, the subject of *Barnett v. Barnett,* were those "growing out of the marital relation". See fourth syllabus.

It affirmatively appears that the contract was before the court in the divorce proceeding (R. 63). Plaintiff in error answers this by questioning the jurisdiction of the court to make the statement and provision found in last paragraph of the final decree. This power of the court has been several times adjudicated.

Remley v. Remley, 33 Cal. App. Dec. 304;
Gould v. Superior Court, 60 Cal. Dec. 5;
Estate of Dargee, 162 Cal. 51.

The contract was not invalid, and was not merged into the judgment in the action for divorce, nor was the judgment in the action for divorce *res judicata* as to any fact necessary to the recovery by defendant in error in this case.

We respectfully contend that the judgment appealed from should be affirmed.

Dated, San Francisco,
October 18, 1922.

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